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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047581
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

ACTIBIOL, S.A.

Petitioner,

v.

MOR-NUTECH, INC.

Registrant.

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Cancellation No. 92047581

Trademark: CAPSOL-T

Registration No.: 3,149,821

**OPPOSITION TO PETITIONER'S MOTION  
FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT.....	1
OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT.....	2
STATEMENT OF UNDISPUTED FACTS.....	2
(1) The Statement of Use was Properly Filed.....	2
(2) The Application Leading to the Subject Registration was Properly Assigned.....	6
REGISTRANT'S MOTION FOR SUMMARY JUDGMENT.....	9
STATEMENT OF UNDISPUTED FACTS.....	10
(1) Petitioner Has No Standing Based on its Foreign Registrations or Based on its Application to Extend its International Registration to The U.S.....	10
(2) Petitioner Has No Standing on Use of The Mark In The U.S. ....	11
CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 326 (1986).....	9
<i>Clorox Co. v. Chemical Bank</i> , 40 USPQ2d 1098 (TTAB 1996).....	6,7
<i>In re Colombo, Inc.</i> , 33 USPQ2d 1530 (Comm’r of Pats. 1994).....	5
<i>Dawn Dawn Donut Co. v. Hart’s Food Stores, Inc.</i> , 267 F.2d 358, 121 U.S.P.Q. 430 (2d Cir., 1959).....	14
<i>Febal Cucine, S.p.A. v. Mariner Ventures, Inc.</i> , (TTAB Cancellation No. 92042704, December 18, 2007).....	10
<i>John Anthony, Inc. v. Fashions by John Anthony, Inc.</i> , 209 U.S.P.Q. 517 (T.T.A.B., Opposition No. 91059707, 1980).....	8
<i>Nestle Co. v. Nash-Finch Co.</i> , 4 U.S.P.Q.2d 1085 (T.T.A.B. 1987).....	8
<i>Pfizer, Inc. v. Hamerschlag</i> , 2001 TTAB LEXIS 729 (Opposition No. 118,181 TTAB 2001).....	7
<i>In re Raven Marine, Inc.</i> , 217 U.S.P.Q. 68 (T.T.A.B. 1983).....	8
<i>Young v. AGB Corp.</i> , 152 F.3d 1377, 1379, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998).....	9

### Trademark Manual of Examination Procedure

TMEP § 504.....	3,5
TMEP § 504.1.....	3
TMEP § 502.02(a).....	4
TMEP § 501.05.....	4
TMEP § 1109.10.....	5

### Statute

15 U.S.C. § 1060(a)(1).....	6,7,9
-----------------------------	-------

### Treatise

McCarthy on Trademarks, Section 18:43, fn. 2.....	8
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**OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Registrant, Mor-NuTech, Inc. by its attorneys, Greenlee, Winner and Sullivan, respectfully submits this opposition to the Motion for Summary Judgment made by Actibiol, S.A. and Cross-Motion for Summary Judgment.

**PRELIMINARY STATEMENT**

On December 20, 2007, Petitioner moved for Summary Judgment alleging (1) Registrant's Statement of Use was improper; and (2) the application leading to the subject registration was improperly assigned.

The Cross-Motion for Summary Judgment submitted herein is based on lack of standing by Petitioner to bring this Action, as Petitioner has not alleged facts sufficient to support standing. Granting of Registrant's Cross-Motion for Summary Judgment

should dispose of this entire proceeding without the necessity for the Board to consider the allegations in Petitioner's Motion for Summary Judgment.

Registrant submits in support of this Cross-Motion the accompanying Declarations of Ellen P. Winner and Dr. D. James Morre in support of the evidence submitted herewith.

Registrant moves for summary judgment based on this Cross-Motion for Summary Judgment and moves that the Trademark Trial and Appeal Board dismiss this Petition for Cancellation. In the alternative, Registrant moves that the Trademark Trial and Appeal Board dismiss Petitioner's Summary Judgment Motion of December 20, 2007 for the reasons presented herein. However, Petitioner has had the benefit of Applicant's responses to its discovery requests, but Registrant has not received Petitioner's responses to its discovery requests. Thus, if the Board believes further evidence is necessary to support this pleading under FRCP 56(f), Registrant requests that the Board deny Petitioner's Motion for Summary Judgment and issue an order compelling Petitioner to submit its evidence in support of its assertion that it has standing to bring this action.

#### **OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT STATEMENT OF UNDISPUTED FACTS**

Registrant agrees with the Statement of Undisputed Facts set forth in Petitioner's Motion for Summary Judgment.

##### **(1) The Statement of Use was *properly filed*.**

Contrary to the allegations in the Motion for Summary Judgment, Registrant's Statement of Use was properly filed. For the Board's convenience, Exhibit A provides a timeline showing the relevant events. Exhibit B is a print-out of the Tarr Status entries for the CAPSOL-T registration evidencing these dates. The timing of these events is undisputed by the parties.

Mor-NuTech took all proper steps to file the Statement of Use. The Statement of Use was filed on June 26, 2006, within six months of the date of the Notice of Allowance, December 27, 2005, through the TEAS system. The Patent and Trademark Office “strongly encourages” applicants to use the TEAS system. See Exhibit C, a PTO press release dated October 8, 2004 downloaded from the Patent and Trademark Office website on January 9, 2008. Applicants took all possible steps under the TEAS system to properly file the Statement of Use, thereby complying with the PTO’s policy of encouraging use of this system.

It is not disputed that the date of first use of the CAPSOL-T mark was shown to be at least as early as June 5, 2006 (Exhibit A11 to Petitioner’s Motion for Summary Judgment).

The Assignment of the trademark to Mor-NuTech, Inc. (Exhibit B3 to Petitioner’s Motion for Summary Judgment) was signed by the Applicants (James and Dorothy Morré) and the Registrant (Mor-NuTech) on June 8, 2006 and recorded in the Patent and Trademark Assignment Division on June 26, 2006, the same date that the Statement of Use was filed.

The Statement of Use was filed by the record owners of the trademark reflected in the Patent and Trademark Office TEAS system records for the application when the Statement of Use was filed because the TEAS electronic form states: **“Note: If the name of the applicant has actually changed, you may not do a ‘correction.’ You must file an actual change of name document/assignment and recordation form PTO-1594.”** The TEAS system also prevented change of the applicant’s name during prosecution of application that led to the present registration of the CAPSOL-T mark. To ensure the appropriate owner was reflected when the Statement of Use was filed, Registrant’s attorney caused the Assignment transferring ownership of the application from Applicants to Registrant to be recorded with the Assignment Services Branch on the same date that the Statement of Use was filed (June 26, 2006). TMEP Sections 504 and 504.1 state that the TEAS records will be automatically updated from documents

that are recorded with the Assignment Division. Under TMEP Section 502.02(a), “recording a document with the Assignment Services Branch will automatically update ownership in TRAM” (emphasis added). The electronic field for Applicants’ name therefore should have been automatically updated to show the change of applicant. The TMEP explicitly recognizes that an “Assignee Stands in Place of the Applicant.” Section 501.05. Furthermore, Registrant believes the request for recordation of Assignment was timely filed relative to the Statement of Use because, under TMEP Section 502.02(a):

To ensure that the registration issues in the name of the new owner, the new owner should record the assignment . . . prior to acceptance of a statement of use in an application based on 15 U.S.C. §1051(b).

In this case, the Assignment was recorded (on June 26, 2006) before the acceptance of the Statement of Use (July 17, 2006).

It is submitted that applicants have a right to rely on the published procedures of the Patent and Trademark Office when filing through the TEAS system, and so as not to cause problems with the system, applicants are justified in not attempting to interfere with processes that are to be performed automatically.

As shown in the electronic records for the CAPSOL-T application (Exhibit B), the TEAS system was updated automatically with the Assignment information on July 5, 2007 before the Statement of Use processing was completed on July 17, 2005 and the Statement of Use was accepted on July 18, 2005, and thus the system performed as it should have.

Therefore, when the Statement of Use was evaluated by the Trademark Office Examiner, the record reflected Mor-NuTech, Inc. as the applicant, as was intended by Registrant’s attorneys and as was consistent with the actions taken by Registrant’s attorneys. Registrant’s attorneys took actions that were intended and reasonably designed to cause the TEAS system to reflect the correct applicant for the application when the Statement of Use was evaluated, and in fact this is what happened.



Applicants followed the procedures available on the TEAS system for properly filing the Statement of Use. The TEAS Statement of Use form explicitly warns that it does not permit a change in an applicant's name, and instead directs the user to record an assignment noting the applicant change. Because there was no way for the name of the trademark applicants to be updated on the TEAS Statement of Use form except by filing an Assignment, which was done, the Statement of Use was properly filed and Petitioner's summary judgment motion on this basis should be denied.

Petitioner is relying on TMEP Section 1109.10, entitled "Ownership," for their allegation that the Statement of Use was not filed by the correct party. However, this section of the TMEP is directed to situations such as those described in *In re Colombo, Inc.*, 33 USPQ2d 1530 (Comm'r of Pats. 1994), cited in TMEP Section 1109.10. The events of that case took place prior to the institution of the TEAS system. In addition, in that case the Statement of Use that was refused was filed in the name of the original applicant, CMHC, Inc., on November 30, 1992, close to *a year after* the assignment to the new owner, Colombo, Inc., was recorded. The applicant in that case was not justified in relying on an automatic updating of the applicant's name from the assignment records. In fact, TMEP Section 504 states: "Prior to November 2, 2003, recording a document with the Assignment Services Branch of the USPTO did not automatically change the ownership record in the Trademark Database." Instead, the "new owner" was required to "notify the Trademark Operation that ownership had changed." The applicant in *In re Columbo* never notified the Trademark Operation that ownership had changed. In contrast, as shown above, the applicants in the present case notified the Trademark Operation that ownership had changed by the fact that the Assignment was recorded with the Assignment Services Branch at the time the Statement of Use was filed. Accordingly, Registrant's attorneys were justified in following established Trademark Office procedures by relying on an automatic updating of the applicant's name from the assignment records. This is in contrast to *In re Columbo* where applicants did not take all possible steps to correctly file the Statement

of Use. Registrant Mor-NuTech's attorneys took all possible steps allowed by the TEAS system to correctly file the Statement of Use.

Therefore, it is respectfully requested that the Board deny Petitioner's Motion for Summary Judgment based on the Statement of Use filing.

**(2) The application leading to the subject registration was *properly assigned*.**

Contrary to the allegations in Petitioner's Motion for Summary Judgment, the Assignment of the mark and trademark application (Exhibit B3 of Petitioner's Motion for Summary Judgment) was in accordance with 15 U.S.C. Section 1060(a)(1), which states that an assignment to (1) a successor to the business of the applicant or portion thereof to which the mark pertains, (2) if the business is ongoing and existing, is valid for transfer of rights in a trademark application prior to filing of a Statement of Use. As the record shows, the original applicants (James and Dorothy Morré) were using the mark in commerce when the Assignment was executed on June 8, 2006, and Mor-NuTech was a successor to the ongoing, existing business to which the mark pertains.

In the present instance, the Assignment recites that the Assignors "wish to transfer . . . the **business associated with the trademark**," that Assignee "is **assuming the business** of Assignors that pertains to the . . . trademark," and that Assignors assign "the **goodwill of the business**." [Emphasis added.] Thus the Assignment of the CAPSOL-T application was clearly to "a successor to the business of the applicant or portion thereof to which the mark pertains." Further, the business was ongoing and existing at the time of the Assignment, in contrast to Petitioner's assertion. The mark was already being used in commerce at the time of the Assignment. See timeline, Exhibit A. Thus all requirements of Section 1060(a)(1) were properly met.

Section 1060(a)(1) is not applicable to situations such as the present case in which the mark has already been used. In contrast to the facts of *Clorox Co. v. Chemical Bank*, 40 USPQ2d 1098 (TTAB 1996), cited by Petitioner, in the present case, the Assignee, Mor-NuTech, was a true successor to the original Applicants' ongoing

business at the time the Assignment was made and was not merely taking a security interest as was the case in *Clorox*. See timeline, Exhibit A (showing that the mark was used by original Applicants on June 5, 2006, and that original Applicants later assigned the application on June 8, 2006). As stated in the *Clorox* case as part of its analysis of the legislative history of Section 1060(a)(1): “Permitting assignment of applications **before a mark is used** would conflict with the principle that a mark may be validly assigned only with some of the business or goodwill attached to use of the mark and would encourage trafficking in marks.” The statute is applicable only to transfers where the mark has not been used, not to transfers such as that made herein where the mark had already been used.

Registrant notes that *Pfizer, Inc. v. Hamerschlag*, 2001 TTAB LEXIS 729 (TTAB 2001), cited by Petitioner, which is the decision in Opposition No. 118,181, is published as “Not Citable as Precedent.” In any event, the facts of that case are entirely different from those of the present case. In that case, when the applicant assigned the application, as he had testified in deposition, he did not as an individual have any ongoing business using the mark. In contrast, in the present instance the individual original applicants (James and Dorothy Morré) did have an ongoing business using the mark CAPSOL-T.

To summarize, 15 U.S.C. § 1060(a)(1) is satisfied because the CAPSOL-T mark was already in use when it was assigned, the Assignment recited that the Assignee was assuming Assignors’ business pertaining to the mark, and the goodwill of the business associated with the mark was transferred.

Petitioner’s Motion for Summary Judgment asserts that no business was transferred to Mor-NuTech on June 8, 2005 because Mor-NuTech was already operating the business under an amendment to a trademark license from Mor-NuTech to Scientific Motive Systems, Inc. (SMS) that was made retroactive to the date of first use of the mark (Exhibit D6 of Petitioner’s Motion for Summary Judgment). Petitioners, however, are mischaracterizing or misinterpreting the amendment to the license

provided as Exhibit D6 of Petitioner's Motion for Summary Judgment and Petitioner's interpretation is not supported by the facts.

The parties agree that all use of the CAPSOL-T mark has been through SMS (Exhibit E2 to Petitioner's Motion for Summary Judgment) under license. However, Mor-NuTech could not have legally licensed to SMS a property right which it did not own. Mor-NuTech did not own the property right in the CAPSOL-T mark until it received the Assignment from the original applicants on June 8, 2006. Therefore, the amendment to the license agreement from Mor-NuTech to SMS (Exhibit D6 of Petitioner's Motion for Summary Judgment) should be interpreted as being retroactive to "the date of first use of the mark *by Mor-NuTech*," i.e., June 8, 2006 (not as being retroactive to June 5, 2006, the date of first use by the original applicants as Petitioners would argue). Prior to June 8, 2006, Mor-NuTech did not own any rights in the CAPSOL-T mark and so could not license any rights in the mark until June 8, 2006. In contrast to the assertions made by Petitioners, the facts show that the two individuals who owned the trademark application were in fact, using the mark CAPSOL-T through SMS prior to the assignment of June 8, 2006 to Mor-NuTech.

The use of the CAPSOL-T mark by SMS prior to June 8, 2006 was under oral license between the parties. See Declaration of original applicant, Dr. D. James Morré, Exhibit D. Oral licenses are permissible if quality control exists. McCarthy on Trademarks, Section 18:43, fn. 2; *John Anthony, Inc. v. Fashions by John Anthony, Inc.*, 209 U.S.P.Q. 517 (T.T.A.B., Opposition No. 91059707, 1980) (oral license found); *In re Raven Marine, Inc.*, 217 U.S.P.Q. 68 (T.T.A.B. 1983) (no oral license found because quality control not shown); *Nestle Co. v. Nash-Finch Co.*, 4 U.S.P.Q.2d 1085 (T.T.A.B. 1987) (sufficient actual quality control was found in licensing of food mark to delicatessens, even though there was no written license). In the present instance, quality control was exercised by the original applicants. See Declaration of original applicant, D. James Morré, Exhibit D, Paragraphs 2-4. Since quality control by the licensors, the original applicants, existed when the original applicants first used the mark through SMS, the oral license from them to SMS was proper.

Thus, at the time of the assignment of the application from the original applicants to Mor-NuTech, the original applicants were conducting an ongoing business associated with the mark, and Mor-NuTech assumed this ongoing business as required by Section 1060(a)(1) of the Trademark Act, and therefore, the registration cannot be voided under that Section.

Therefore it is respectfully requested that the Board deny Petitioner's Motion for Summary Judgment based on the allegation related to the assignment.

### **REGISTRANT'S CROSS MOTION FOR SUMMARY JUDGMENT**

Petitioner, ActiBiol, S.A., is basing this cancellation proceeding on alleged U.S. trademark rights in the mark CAPSIBIOL-T coupled with alleged confusing similarity between the marks CAPSIBIOL-T and CAPSOL-T. For a petitioner to prevail in a cancellation proceeding it is incumbent upon that party to show that (1) it possesses standing to challenge the continued presence on the register of the subject registration and (2) there is a valid ground why the registrant is not entitled under law to maintain the registration. *Young v. AGB Corp.*, 152 F.3d 1377, 1379, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). If the plaintiff is unable to establish its standing to bring its claims, the Board need not reach the merits of the case, but may enter judgment for the defendant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). In this case, Petitioner lacks standing because it has no U.S. rights in the CAPSIBIOL-T mark, either based on its foreign registrations or its application to extend its international registration for CAPSIBIOL-T to the U.S., or based on use of the mark in the U.S. Because Petitioner is not damaged by Registrant's CAPSOL-T mark, it has no standing to Petition for Cancellation of the CAPSOL-T registration.

## STATEMENT OF UNDISPUTED FACTS

1. Petitioner is the owner of foreign registrations in Hong Kong and Switzerland, as well as an International Registration (No. 836,596) for the mark CAPSIBIOL-T and has filed a U.S. application to extend protection of its international registration to the U.S., all as stated in the Petition to Cancel (Paragraph 4).
2. Petitioner's U.S. application is Application No. 79037970 filed February 8, 2007 under Section 66A of the Trademark Act.
3. Petitioner's only claim to use-based U.S. rights in the mark CAPSIBIOL-T is its assertion of foreign and international registrations and a U.S application to extend its international registration to the U.S. (Petition for Cancellation Paragraph 4) and its allegation that all use of the mark by SMS inures to its benefit (Petition for Cancellation, Paragraphs 5 and 6).

### **(1) Petitioner Has No Standing Based on its Foreign Registrations or Based on its Application to Extend Its International Registration to The U.S.**

Petitioner has not alleged that it is the owner of a registered U.S. trademark nor that it is the owner of a U.S. trademark application that has been refused registration based on Registrant's CAPSOL-T registration. Petitioner's U.S. application, Application No. 79037970 filed February 8, 2007, was filed under Section 66A of the Trademark Act, and did not allege previous U.S. use of the CAPSIBIOL-T mark. This application has been suspended in view of Application Serial No. 78164838 (Registrant's CAPSIBIOL-T application), 78328802 (Registrant's CAPSIBIOL registration) and 78867937 (Registrant's CAPSIVIROL-T application) (Notice of Suspension issued December 28, 2007). It has not been suspended in view of Registrant's CAPSOL-T registration. (See Exhibit E, Notice of Suspension in Serial No. 79037970). As held in *Febal Cucine, S.p.A. v. Mariner Ventures, Inc.*, (TTAB Cancellation No. 92042704, December 18, 2007): "The simple ownership of a U.S. trademark application, without any indication that the application has been or will be refused registration in view of a registration or a pending application, does not provide a basis for standing. Also, the ownership of a foreign trademark registration does not give a party a license to petition to cancel a U.S. trademark registration." Thus, neither Petitioner's foreign registrations

nor its pending application to extend its international registration to the U.S. provides it standing to bring this proceeding.

**(2) Petitioner Has No Standing Based on Use of The Mark In The U.S.**

Petitioner asserts that it has prior use-based rights in the U.S. in the mark CAPSIBIOL-T and that that mark is confusingly similar to CAPSOL-T. The parties agree that the only use of the CAPSIBIOL-T trademark in the U.S. has been through SMS. Petitioner's only claim to use-based U.S. rights in the mark CAPSIBIOL-T, is its allegation that all use of the CAPSIBIOL-T mark by SMS inures to Petitioner's benefit, as stated in the Petition for Cancellation (Paragraphs 5 and 6). Petitioner has not presented any other allegation or evidence of use of the CAPSIBIOL-T mark in the U.S. Registrant agrees that the only use of the CAPSIBIOL-T mark has been through SMS; however, Registrant asserts and shows herein that all use by SMS inures to Registrant's benefit.

The Petition for Cancellation alleges in Paragraph 5 that "Mr. Manoukian licensed the [CAPSIBIOL-T] trademark to Portola Sciences, Inc., . . . and that Portola sub-licensed the authority to use the CAPSIBIOL-T trademark to Scientific Motive Systems, Inc. ('SMS'). These license agreements were entered in February and March 2000."

The issue is therefore whether or not the use of the CAPSIBIOL-T mark by SMS inured to the benefit of Petitioner or to the benefit of Registrant herein.

Presented herewith as Exhibit F is a copy of a statement to Portola Sciences, Inc. signed by Georges Manoukian and Guy Auderset stating "I hereby authorize Portola Sciences, Inc. of Portola Valley, California to act as the sole agent for negotiation of licensing of 'Capsibiol T' for U.S. manufacture and marketing and for use of 'Capsibiol T' as a U.S. trademark." The document is dated February 10, 2000 and signed on February 14, 2000. As supported in the Declaration of Dr. D. James Morré, Exhibit D, this is the only document known to Registrant that bears any relation to Petitioner's statement in Paragraph 5 of the Petition for Cancellation, that "Mr.

Manoukian licensed the trademark to Portola Sciences, Inc.” Petitioner, Actibiol, is nowhere mentioned in this statement.

Attached hereto as Exhibit G is a copy of an “Exclusive License Agreement” dated March 20, 2000 from Portola Sciences, Inc. to Scientific Motive Systems (SMS), which licenses technology invented by Guy Auderset, Georges Manoukian and D. James Morré, (and also licenses all trademarks associated with the subject technology including “Capsibiol-T”). As supported in the Declaration of Dr. D. James Morré, Exhibit D, Registrant knows of no other document that bears any relation to the statement in Paragraph 5 of the Petition for Cancellation, that Portola sub-licensed the authority to use the CAPSIBIOL-T trademark to Scientific Motive Systems, Inc. (“SMS”). Petitioner, Actibiol, is nowhere mentioned in this Agreement.

Attached hereto as Exhibit H is a copy of an “Exclusive Agreement” dated March 19, 2000 between SMS and Dr. D. James Morré, Dr. Guy Auderset, and Mr. Georges Manoukian, (“The Inventors”). This document does not mention the trademark, CAPSIBIOL-T, but does provide for royalty payments to “The Inventors.” Petitioner, Actibiol, is nowhere mentioned in this Agreement.

Attached hereto as Exhibit I is a summary of royalties paid by SMS to Portola, Auderset, and “Menukian/Mesrobian.” As supported in the Declaration of Dr. D. James Morré, Exhibit D, this is the only document in Registrant’s possession that bears any relation to the statement that “SMS paid royalties to Actibiol for sales of the Capsibiol-T product” in Paragraph 6 of the Petition for Cancellation. Petitioner, Actibiol, is nowhere mentioned in this document.

Attached hereto as Exhibit J is a copy of the Assignment of the CAPSIBIOL-T trademark from Portola to Mor-NuTech along with the business associated with the use of the mark dated July 3, 2006, as well as a copy of the Assignment Recordation Sheet showing that the Assignment was recorded in the U.S. Patent and Trademark Office Assignment Division at Reel/Frame 3349/0096 on July 17, 2006.



Attached hereto as Exhibit K is a copy of a letter dated September 6, 2002 from Georges Manoukian to Donald Lee of Portola asserting that Mr. Manoukian is a “co-owner” of the CAPSIBIOL-T trademark and stating that because Donald Lee requested abandonment of a U.S. Trademark Application for CAPSIBIOL-T, “the authorization that I had granted you to negotiate a license of exploitation of ‘CAPSIBIOL-T’ in the United States is now null and void.” Petitioner, Actibiol, is mentioned only as part of Mr. Manoukian’s address (“c/o Actibiol SA”). It is clear that Mr. Manoukian is asserting that he, himself (as opposed to Actibiol), is the owner of the CAPSIBIOL-T mark by the language, “As co-owner of the “CAPSIBIOL-T” trademark, as inventor, unique holder and creator of the secret formula . . . “ used in this letter.

This document is of record in the file history of Application No. 75895915 for CAPSIBIOL-T in connection with the applicant’s unsuccessful attempts to revive that application.

Based on Exhibits E, F, G, I, J, and K, it is submitted that Petitioner Actibiol has not shown, and does not have, rights to the CAPSIBIOL-T mark in the U.S.

Exhibit F does not constitute a trademark license from Petitioner, ActiBiol, to Portola for the following reasons: It does not mention ActiBiol at all. It is signed by Georges Manoukian and Guy Auderset. Georges Manoukian is allegedly the Managing Director of ActiBiol, but the document does not indicate Georges Manoukian was acting on behalf of ActiBiol. The official relationship of Guy Auderset to ActiBiol (if any) is not stated, and is not known. This document is not signed by anyone on behalf of Portola, and thus does not indicate that Portola is assuming any obligations under this document.

This document contains no provisions for quality control. Accordingly, even if Exhibit F were held to constitute a trademark license from ActiBiol to Portola, the license is “naked,” and thus the alleged Licensor has no trademark rights in the mark. See

*Dawn Dawn Donut Co. v. Hart's Food Stores, Inc*, 267 F.2d 358, 121 U.S.P.Q. 430 (2d Cir., 1959) and cases cited therein. In fact, as shown by the Declaration of Dr. D. James Morré, Exhibit D, all quality control for the CAPSIBIOL-T product was done under Dr. Morré's direction on behalf of the owner of the trademark at the time, *i.e.*, Portola, followed by Mor-NuTech.

At the time this document, Exhibit F, was signed by Georges Manoukian and Guy Auderset, no U.S. rights in the CAPSIBIOL-T trademark even existed. This document was signed on February 14, 2000, long before the first use date alleged in the Petition for Cancellation, *i.e.*, "at least as early as September, 2000." At the time this document was signed, no application for registration of the mark had been filed in the U.S. based on use or intent to use, thus no constructive rights in the mark existed.

It is submitted that Exhibit F creates no legal rights or obligations between Portola and Petitioner with respect to ownership or licensing of the CAPSIBIOL-T trademark in the U.S.

Moreover, as shown in Exhibit K, Georges Manoukian cancelled his purported authorization to Portola on September 6, 2002. Thus, no use of the CAPSIBIOL-T mark in the U.S. after that date by Portola (through SMS) could even colorably be said to inure to the benefit of ActiBiol. At that time, all use of the mark by SMS was inuring, and continued to inure, to the licensor, Portola. After Assignment of the CAPSIBIOL-T mark and associated business to Mor-NuTech in 2006, all rights in the CAPSIBIOL-T mark inured to Mor-NuTech.

Exhibit G is an Exclusive License Agreement between Portola and SMS covering the CAPSIBIOL-T trademark. It is signed on behalf of Portola by Donald A. Lee and Dr. D. James Morré and Dorothy M. Morré (the Morrés being the original applicants for registration of CAPSOL-T in the U.S.) This document does not mention ActiBiol or Georges Manoukian. Exhibit J shows that Portola assigned its rights in the CAPSIBIOL-T trademark and associated business to Registrant herein in July of 2006. Thus all rights in the CAPSIBIOL-T mark by SMS inured from then on to Registrant herein.

Exhibits H and I, the “Exclusive Agreement” regarding use of technology between “The Inventors,” D. James Morré, Guy Auderset and Georges Manoukian,” dated March 19, 2000, and the summary of royalty payments, show that royalty payments were not paid by SMS to Petitioner (ActiBiol) for trademark rights, but rather to Portola, Auderset and “Menukian/Mesrobian” (The relationship of “Menukian/Mesrobian” to ActiBiol is not known). It is believed these parties are Edouard Manoukian and Edwige L. Mesrobian, owners of Registration No. 3064221, which was successfully cancelled by Registrant herein (Cancellation No. 92046423). These royalty payments were being made in 2001, prior to the date the application for registration 3064221 was filed on September 3, 2002 by Manoukian and Mesrobian, and this fact, together with the technology license (Exhibit H) that required royalty payments, show that the fact that royalty payments were being made by SMS does not prove that these royalty payments were being made to ActiBiol nor does it prove that the royalty payments were being made for the use of the CAPSIBIOL-T trademark.

In view of the foregoing, Petitioner has not shown that it owns rights in the U.S. to the CAPSIBIOL-T trademark, either as a result of its foreign registrations, its application to extend its international CAPSIBIOL-T registration to the U.S., or through the actual use by SMS that it alleges inures to its benefit. Because Petitioner has no rights in the U.S. to the CAPSIBIOL-T trademark, it has no standing to bring this action and Registrant requests the Petition for Cancellation be dismissed with prejudice.

### **CONCLUSION**

In view of the foregoing, Denial of Petitioner’s Motion for Summary Judgment is respectfully requested, and Granting of Registrant’s Cross-Motion for Summary Judgment, based on lack of standing, is also respectfully requested. In the event the Board determines that insufficient facts have been alleged to Registrant’s position in its Cross-Motion for Summary Judgment that Petitioner has not shown actual use of the mark in the U.S., it is respectfully requested that the Board issue an order

compelling Petitioner to submit all its evidence in support of its assertion that it has standing to bring this action, or to dismiss Petitioner's Motion for Summary Judgment.

Respectfully submitted,

MOR-NUTECH, INC.

By /ellenwinner/

Ellen P. Winner, Attorney for Registrant  
Reg. No. 28,547

Greenlee, Winner and Sullivan  
4875 Pearl East Circle, #201  
Boulder, Colorado 80301  
Telephone 303-499-8080  
Fax: 303-499-8089  
Email: [Ewinner@greenwin.com](mailto:Ewinner@greenwin.com)  
Date January 24, 2008

## **CERTIFICATE OF SERVICE**

I certify that a copy of this paper was sent by first-class mail, this 24<sup>th</sup> day of January, 2008, postage prepaid, to the last known address of the attorney of record for Petitioner, as follows:

**Gary J. Nelson  
Tiffany A. Parcher  
CHRISTIE, PARKER & HALE, LLP  
Post Office Box 7068  
Pasadena, CA 91109-7068**

/laurasedlacek/

Laura Sedlacek

Greenlee, Winner and Sullivan  
4875 Pearl East Circle, #201  
Boulder, Colorado 80301  
Telephone 303-499-8080  
Fax: 303-499-8089  
Email: Ewinner@greenwin.com  
Date: January 24, 2008

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

ACTIBIOL, S.A.

Petitioner,

v.

MOR-NUTECH, INC.

Registrant.

Cancellation No. 92047581

Trademark: CAPSOL-T

Registration No.: 3,149,821

**DECLARATION OF ELLEN P. WINNER IN SUPPORT OF REGISTRANT'S  
OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

I, Ellen P. Winner, state as follows:

1. I am an attorney admitted to practice before the United States Patent and Trademark Office (Reg. No. 28,547), and I am a shareholder at the law firm of Greenlee, Winner and Sullivan, P.C., attorneys for Registrant, Mor-NuTech, Inc.
2. Attached as Exhibit A to this Declaration is a timeline I prepared based on information present in Exhibit B.
3. Attached as Exhibit B is a true and correct copy of a print-out of the Tarr Status entries for the CAPSOL-T registration evidencing the dates used in construction of the timeline of Exhibit A.
4. Attached as Exhibit C is a true and correct copy of a PTO press release dated October 8, 2004 downloaded from the Patent and Trademark Office website on January 9, 2008, which encourages applicants to use the TEAS system.
5. Attached as Exhibit D is a Declaration of original applicant and President of Registrant, Dr. D. James Morre, supporting facts and Exhibits provided herein.

6. Attached as Exhibit E is a printout from the Patent and Trademark Office website of the Notice of Suspension issued in Petitioner's trademark application Serial No. 79037970 for extension of its international registration to the U.S.
7. Attached as Exhibit F is a true and correct copy of an "authorization" statement to Portola Sciences, Inc. signed by Georges Manoukian and Guy Auderset on February 14, 2000 provided to me by Registrant.
8. Attached as Exhibit G is a true and copy of an "Exclusive License Agreement" dated March 20, 2000 from Portola Sciences, Inc. to Scientific Motive Systems (SMS) provided to me by Registrant.
9. Attached as Exhibit H is a true and correct copy of an "Exclusive Agreement" dated March 19, 2000 between SMS and Dr. D. James Morre, Dr. Guy Auderset, and Mr. Georges Manoukian, ("The Inventors") provided to me by Registrant.
10. Attached as Exhibit I is a true and correct copy of a summary of royalties paid by SMS to Portola, Auderset, and "Menukian/Mesrobian" provided to me by Registrant.
11. Attached as Exhibit J is a true and correct copy of the Assignment of the CAPSIBIOL-T trademark from Portola to Mor-NuTech along with the business associated with the use of the mark dated July 3, 2006 from my files, as well as a copy of the Assignment Recordation Sheet showing that the Assignment was recorded in the U.S. Patent and Trademark Office Assignment Division at Reel/Frame 3349/0096 on July 17, 2006 downloaded from the Patent and Trademark website by me.
12. Attached as Exhibit K is a true and correct copy of a letter dated September 6, 2002 from Georges Manoukian to Donald Lee of Portola provided to me by Registrant.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

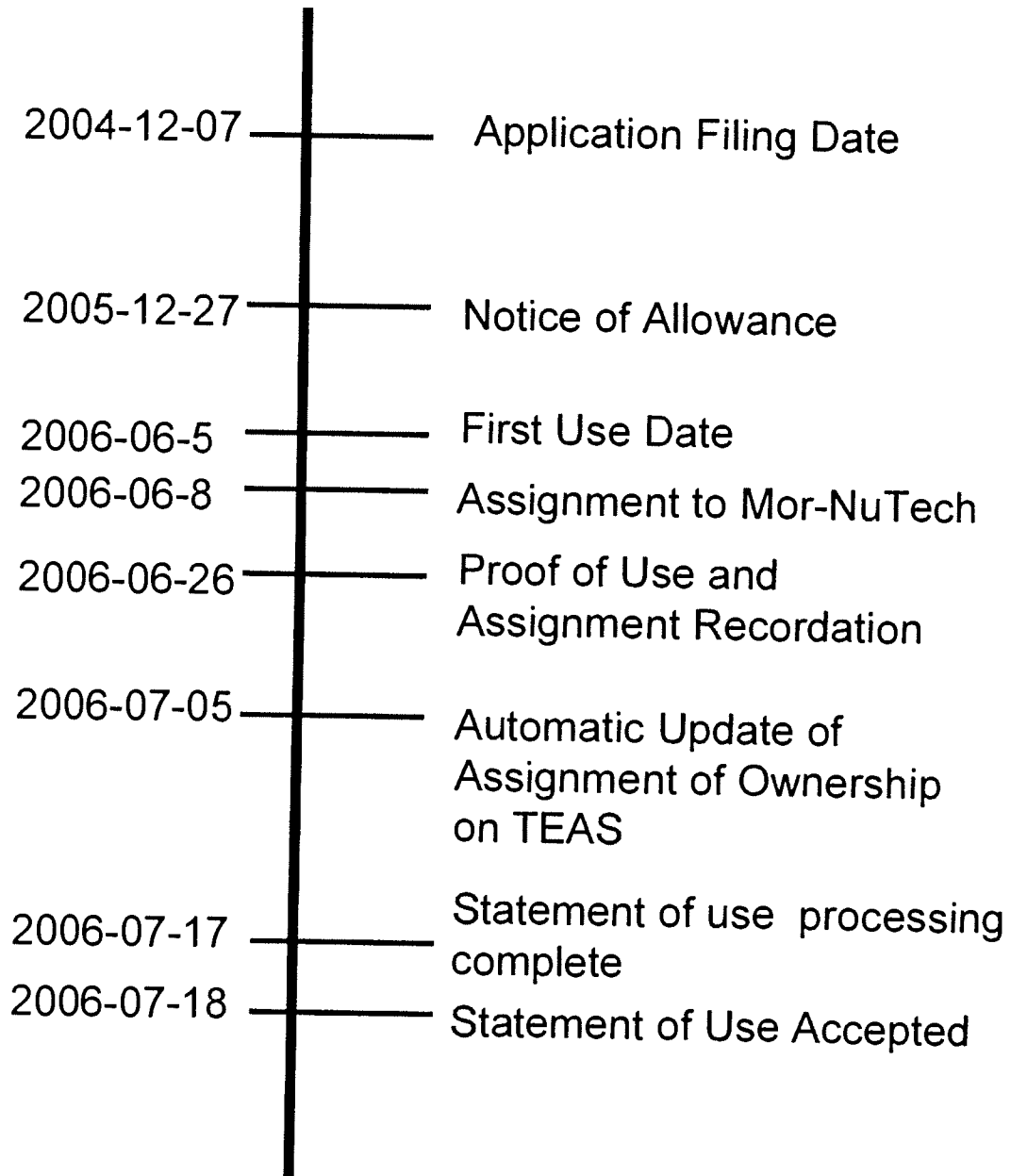
Executed this 24<sup>th</sup> day of January 2008



Ellen P. Winner

EXHIBIT A

**CAPSOL-T STATEMENT  
OF USE TIMELINE**





**Thank you for your request. Here are the latest results from the TARR web server.**

**This page was generated by the TARR system on 2008-01-09 17:27:09 ET**

**Serial Number:** 78528700 Assignment Information      Trademark Document Retrieval

**Registration Number:** 3149821

**Mark**

**CAPSOL-T**

**(words only):** CAPSOL-T

**Standard Character claim:** Yes

**Current Status:** A cancellation proceeding has been filed at the Trademark Trial and Appeal Board and is now pending.

**Date of Status:** 2007-05-30

**Filing Date:** 2004-12-07

**Transformed into a National Application:** No

**Registration Date:** 2006-09-26

**Register:** Principal

**Law Office Assigned:** LAW OFFICE 111

**If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov**

**Current Location:** 650 -Publication And Issue Section

**Date In Location:** 2006-08-15

**LAST APPLICANT(S)/OWNER(S) OF RECORD**

1. MOR-NUTECH, INC.

**Address:**  
MOR-NUTECH, INC.

1112 CHERRY LANE  
WEST LAFAYETTE, IN 47906  
United States  
**Legal Entity Type:** Corporation  
**State or Country of Incorporation:** Indiana

---

### GOODS AND/OR SERVICES

---

**International Class:** 005  
**Class Status:** Active  
Nutritional supplement  
**Basis:** 1(a)  
**First Use Date:** 2006-06-05  
**First Use in Commerce Date:** 2006-06-05

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### ADDITIONAL INFORMATION

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(NOT AVAILABLE)

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### MADRID PROTOCOL INFORMATION

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(NOT AVAILABLE)

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### PROSECUTION HISTORY

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**NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.**

2007-05-30 - Cancellation Instituted No. 9999999  
2006-09-26 - Registered - Principal Register  
2006-08-08 - Law Office Registration Review Completed  
2006-07-28 - Assigned To LIE  
2006-07-18 - Allowed for Registration - Principal Register (SOU accepted)  
2006-07-17 - Statement of use processing complete  
2006-06-26 - Amendment to Use filed  
2006-07-05 - Automatic Update Of Assignment Of Ownership  
2006-06-26 - TEAS Statement of Use Received  
2005-12-27 - Notice of allowance - mailed

2005-10-04 - Published for opposition  
2005-09-14 - Notice of publication  
2005-07-20 - Law Office Publication Review Completed  
2005-07-15 - Assigned To LIE  
2005-07-12 - Approved for Pub - Principal Register (Initial exam)  
2005-07-12 - Examiners amendment e-mailed  
2005-07-12 - Examiners Amendment -Written  
2005-07-12 - Assigned To Examiner  
2004-12-20 - New Application Entered In Tram

---

**ATTORNEY/CORRESPONDENT INFORMATION**

---

**Attorney of Record**

Ellen P. Winner

**Correspondent**

Ellen P. Winner  
Greenlee, Winner & Sullivan, P.C.  
4875 Pearl East Circle Suite 200  
Boulder, CO 80301  
Phone Number: 303-499-8080  
Fax Number: 303-499-8089

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## United States Patent and Trademark Office

NEWS

[Home](#) | [Site Index](#) | [Search](#) | [FAQ](#) | [Glossary](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)[Press Releases](#) > Trademark Operation and Trademark Trial and Appeal Board Move to New Facility

## PRESS RELEASE

Contact:  
Ruth Nyblod  
703-305-8341  
[ruth.nyblod@uspto.gov](mailto:ruth.nyblod@uspto.gov)

October 8, 2004  
#04-26

**Trademark Operation and Trademark Trial and Appeal Board Move to New Facility**  
USPTO's move to consolidated headquarters continues

The Department of Commerce's U.S. Patent and Trademark Office (USPTO) continues its move this week to new consolidated headquarters in Alexandria, Va., with the relocation of the trademark operation and the Trademark Trial and Appeal Board (TTAB). Over the next two months, the entire trademark examining operation, its supporting divisions and the TTAB will begin to conduct business in the new facility. They will occupy several floors of the east and west wings of the Madison building located at 600 Dulany Street.

The Trademark Assistance Center, which provides general information about the trademark registration process and status of trademark applications and registrations, will begin moving Friday evening, October 8, and be open for business on Tuesday morning, October 12. The drop point for all hand deliveries and in-person trademark filings is at the Trademark Assistance Center with a direct entrance from the street making it more convenient for the public. The center is open Monday through Friday, from 8:30 a.m. to 5:00 p.m., except holidays, and will be located in Madison East, Concourse Level, Room C 55.

Trademark examining law offices will begin moving on October 12 and conclude on November 3.

All TTAB employees will move on November 3. At that time, all hearings in TTAB cases will be held in the new facilities in Alexandria.

USPTO's new headquarters is designed to facilitate optimum performance from the state-of-the-art technology the agency uses for full electronic processing of trademark applications. Trademark applicants and registrants are strongly encouraged to file documents via the Trademark Electronic Application System (TEAS), available at <http://www.uspto.gov>, and to file documents with the Trademark Trial and Appeal Board via the Electronic System for Trademark Trials and Appeals (ESTTA), available at <http://estta.uspto.gov>. This is especially important during the transition to the new offices to avoid delays in processing.

For additional information on the trademark operation's move to the new facility, see:  
<http://www.uspto.gov/web/trademarks/notices/tmmovenotice.html>.

At the conclusion of the agency's move in the early spring of next year, over 7,000 USPTO employees and contractors will occupy the five buildings of the Alexandria campus..

###

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Last Modified: 09/06/2007 09:01:10



**EXHIBIT D**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

ACTIBIOL, S.A.

Petitioner,

v.

MOR-NUTECH, INC.

Registrant.

Cancellation No. 92047581

Trademark: CAPSOL-T

Registration No.: 3,149,821

**DECLARATION OF DR. D. JAMES MORRÉ, PRESIDENT OF MOR-NUTECH, IN  
SUPPORT OF REGISTRANT'S OPPOSITION TO PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

I, James D. Morré, state as follows:

1. I am President of Registrant, Mor-NuTech, Inc., and am also employed in the Department of Medicinal Chemistry and Molecular Pharmacology at Purdue University, West Lafayette, IN, in the capacity of Dow Distinguished Professor of Medicinal Chemistry. I am also an original applicant, with co-applicant Dorothy M. Morré, in the application that matured into the subject registration.
2. I state that the first use of the CAPSOL-T mark was by Scientific Motive Systems, Inc. (SMS) on June 5, 2006. At that time, the rights in the mark and the trademark application for the mark were owned by me and my co-applicant, Dorothy M. Morré. On June 8, 2006, we assigned the trademark application for this mark, the business associated therewith, and all rights in the mark and the goodwill of the business associated with it to Mor-NuTech. The first use of the mark was by SMS, the company that was also Mor-NuTech's licensee for the mark CAPSIBIOL-T. SMS had been manufacturing and selling the CAPSIBIOL-T product under license, first from Portola Sciences, Inc. and then under

license from Mor-NuTech since September of 2000. Between June 5, 2006 and June 8, 2006, SMS was using the mark under an oral trademark license from me and Dorothy M. Morré, as we were the owners of the mark during that period, we authorized SMS to use it, and we provided quality control of the CAPSOL-T goods sold under the mark.

3. Quality control was exerted by us by testing the first batch of product by assaying its effect on the growth of cancer cells *in vitro*. The catechin content of the green tea ingredient for every batch is assayed by high-pressure liquid chromatography. These tests are performed under my direction. Quality control continues to be exercised by Mor-NuTech under my direction in the same way.

4. Quality control for the CAPSIBIOL-T product was exerted by Portola Sciences, Inc. while it was the owner of the CAPSIBIOL-T mark, and subsequently by Mor-NuTech, Inc. when it became the owner of the mark, in accordance with my instructions as above.

5. Exhibit F is a true and correct copy of an "authorization" statement to Portola Sciences, Inc. signed by Georges Manoukian and Guy Auderset on February 14, 2000 provided to me by Donald Lee of Portola Sciences, Inc. This is the only document I know of that bears any relation to Petitioner's statement in Paragraph 5 of the Petition for Cancellation, that "Mr. Manoukian licensed the trademark to Portola Sciences, Inc."

6. Exhibit G is a true and correct copy of an "Exclusive License Agreement" dated March 20, 2000 from Portola Sciences, Inc. to Scientific Motive Systems (SMS) provided to me by Donald Lee of Portola Sciences, Inc. I know of no other document that bears any relation to the statement in Paragraph 5 of the Petition for Cancellation, that Portola sub-licensed the authority to use the CAPSIBIOL-T trademark to Scientific Motive Systems, Inc. ("SMS").

7. Exhibit H is a true and correct copy of an "Exclusive Agreement" dated March 19, 2000 between SMS and Dr. D. James Morré, Dr. Guy Auderset, and Mr. Georges Manoukian, ("The Inventors") from my files.

8. Exhibit I is a true and correct copy of a summary of royalties paid by SMS to Portola, Auderset, and "Menukian/Mesrobian" provided to me by Mr. John Van Etten, President of SMS. This is the only document I have knowledge of that bears any relation to the statement that "SMS paid royalties to Actibiol for sales of the Capsibiol-T product" in Paragraph 6 of the Petition for Cancellation. Note that ActiBiol is not specifically mentioned in this document.

9. Exhibit J includes a true and correct copy of the Assignment of the CAPSIBIOL-T trademark from Portola to Mor-NuTech along with the business associated with the use of the mark dated July 3, 2006 from my files.
10. Exhibit K is a true and correct copy of a letter dated September 6, 2002 from Georges Manoukian to Donald Lee of Portola provided to me by Donald Lee.

I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code; and may jeopardize the validity of the registration which is the subject of this cancellation proceeding.

Executed this 24 day of January 2008.

  
D. James Morré



**EXHIBIT E**

---

**to:** ACTIBIOL SA ([pto@cph.com](mailto:pto@cph.com))  
**subject:** TRADEMARK APPLICATION NO. 79037970 - CAPSIBIOL - T - 60466/A902  
**sent:** 12/28/2007 11:12:42 AM  
**sent As:** ECOM112@USPTO.GOV  
**attachments:**

---

UNITED STATES PATENT AND TRADEMARK OFFICE

**SERIAL NO:** 79/037970

**MARK:** CAPSIBIOL - T

**\*79037970\***

**CORRESPONDENT ADDRESS:**

Tiffany A. Parcher

CHRISTIE, PARKER & HALE, LLP.

P.O. Box 7068

Pasadena CA 91109-7068

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**APPLICANT:** ACTIBIOL SA

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

60466/A902

**CORRESPONDENT E-MAIL ADDRESS:**

pto@cph.com

**NOTICE OF SUSPENSION**

**SUE/MAILING DATE:** 12/28/2007

**SUSPENSION PROCEDURE:** This suspension notice serves to suspend action on the application for the reason(s) specified below. No response is needed. 37.C.F.R. §2.67. The Office will conduct periodic status checks to determine if suspension remains appropriate.

Action on this application is suspended pending the disposition of:

- Application Serial No(s). **78164838, 78328802 and 78867937**

Since applicant's effective filing date is subsequent to the effective filing date of the above-identified application(s), the latter, if and when it

gisters, may be cited against this application in a refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). See 37 C.F.R. §2.103; TMEP §§1208 et seq. A copy of information relevant to this pending application(s) **was sent previously**.

Applicant may submit a request to remove the application from suspension to present arguments related to the potential conflict between the relevant application(s) or other arguments related to the ground for suspension. TMEP §716.03. Applicant's election not to present arguments during suspension will not affect the applicant's right to present arguments later should a refusal in fact issue. If a refusal does issue, applicant will be afforded 6 months from the mailing or e-mailing date of the Office action to submit a response. 15 U.S.C. §1062(b); 37 C.F.R. §2.62.

/Benjamin U. Okeke/

United States Patent & Trademark Office

600 Dulany St., Alexandria VA 22314

Law Office 112

571.270.1524

571.270.2524 (Fax)

**STATUS CHECK:** Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

---

**to:** ACTIBIOL SA ([pto@cph.com](mailto:pto@cph.com))  
**subject:** TRADEMARK APPLICATION NO. 79037970 - CAPSIBIOL - T - 60466/A902  
**sent:** 12/28/2007 11:12:46 AM  
**sent As:** ECOM112@USPTO.GOV  
**attachments:**

---

**IMPORTANT NOTICE**  
**USPTO OFFICE ACTION HAS ISSUED ON 12/28/2007 FOR**  
**APPLICATION SERIAL NO. 79037970**

PLEASE follow the instructions below to continue the prosecution of your application:

**VIEW OFFICE ACTION:** Click on this link  
[http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial\\_number=79037970&doc\\_type=SUL&mail\\_date=20071228](http://tportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=79037970&doc_type=SUL&mail_date=20071228)  
or copy and paste this URL into the address field of your browser), or visit  
<http://tportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

**PLEASE NOTE:** The Office action may not be immediately available but will be viewable within 24 hours of notification.

**RESPONSE MAY BE REQUIRED:** You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from 12/28/2007.

**DO NOT** hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does not accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

**ELP:** For *technical* assistance in accessing the Office action, please e-mail [DR@uspto.gov](mailto:DR@uspto.gov). Please contact the assigned examining attorney with questions about the Office action.

**WARNING**

**The USPTO will NOT send a separate e-mail with the Office action attached.**

**Failure to file any required response by the applicable deadline will result in ABANDONMENT of your application.**


EXHIBIT F

February 10, 2000


Fax To: Guy Auderset, 011-41-223-49-9979

Portola Sciences Inc.  
40 Ciervos Road  
Portola Valley, CA 94028  
Phone (650) 851-8855  
Fax (650) 851-1896

I hereby authorize Portola Sciences Inc. of Portola Valley, California to act as the sole agent for negotiation of licensing of 'Capsibiol T' for U.S. manufacture and marketing and for use of 'Capsibiol T' as a U.S. trademark.

  
\_\_\_\_\_  
Georges Manoukian

14 February 2000  
Date

  
\_\_\_\_\_  
Guy Auderset

14 February 2000  
Date

## EXHIBIT G

### EXCLUSIVE LICENSE AGREEMENT

This Exclusive License Agreement ("Agreement"), to be effective as of the 20 day of March, 2000 (hereinafter called "Agreement Date"), is by and between Portola Sciences, Inc., a California corporation, located at 40 Cievos Road, Portola, CA 94028 ("LICENSOR") and Scientific Motive Systems, Inc. a Indiana corporation, located at 5364 Tottenham Circle, Terra Haute, IN 47803 ("LICENSEE").

#### 1. DEFINITIONS AS USED HEREIN

1.1 The term "Subject Technology" shall mean all technology, know-how, methods, formulae, improvements thereto, documents, materials, tests, and confidential information related to the invention of Guy Auderset, of Geneva Switzerland, Georges Manoukian, of Geneva, Switzerland, and D. James Morre, of West Lafayette, IN, relating to a "Nutriceutical Composition for Prevention and Treatment of Cancer", as more particularly described in the provisional patent application previously filed in the United States. The term "Subject Technology" shall also include all applications for patent or like protection on said invention and improvements thereto and all patents or like protection that may in the future be granted on said invention and improvements thereto in the United States of America, and all substitutions for and divisions, continuations, continuations-in-part, renewals, reissues, extensions and the like on said applications and patents. The Subject Technology shall also include any and all trademarks associated with the Subject Technology, including but not limited to "Capsibiol-T."

1.2 The term "Licensed Product(s)" shall mean all products that incorporate, utilize or are made with the use of any of the Subject Technology.

1.3 The term "the Parties" shall mean LICENSEE and LICENSOR.

#### 2. GRANT OF OPTION AND LICENSE

2.1 LICENSOR hereby grants to LICENSEE a sole and exclusive, irrevocable right and license to make, have made, use, market, sell and offer for sale Licensed Products. The License is exclusive even as to LICENSOR.

#### 3. PAYMENTS AND REPORTS

3.1 In the event LICENSEE manufactures Licensed Products, LICENSEE shall pay LICENSOR the following royalties:

A. during the first year which commences with the date of the first sale of Licensed Product and continues for 12 months, a flat royalty rate of 20% of the Gross Sales of Licensed Product sold during the first year, with a maximum royalty payable on said Gross Sales during said first year of \$100,000.00, plus a flat royalty rate of 5% of the Net Profits on all sales of

Licensed Product in excess of the first \$500,000.00 of Gross Sales in said first year. Payments will be made on a quarterly basis;

B during the second year (12 months), a flat royalty rate of 20% of the Gross Sales of Licensed Product, with a maximum royalty payable of \$500,000.00 on said Gross Sales during said second year, plus a flat royalty rate of 5% of the Net Profits on all sales of Licensed Product in excess of the first \$2,500,000.00 of Gross Sales in the second year, provided, however, that the maximum royalties payable on said Gross Sales during said second year shall be reduced by the royalties paid on Net Profits on all sales of Licensed Product in excess of the first \$500,000.00 of Gross Sales in the first year. Payments will be made on a quarterly basis

C during the third year (12 months), a flat royalty rate of 20% of the Gross Sales of Licensed Product, with a maximum royalty payable of \$750,000.00 on said Gross Sales during said third year, plus a flat royalty rate of 5% of the Net Profits on all sales of Licensed Product in excess of the first \$2,500,000.00 of Gross Sales in the third year, provided, however, that the maximum royalties payable on said Gross Sales during said third year shall be reduced by the royalties paid on Net Profits on all sales of Licensed Product in excess of the first \$2,500,000.00 of Gross Sales in the second year; Payments will be made on a quarterly basis

D commencing with the fourth year (12 months) of sales of Licensed Product and continuing until the termination of this Agreement, 3% of the Gross Sales of Licensed Product or 15% of the Net Profits, whichever is greater.

3.2 The term "Gross Sales" shall mean the gross amount of money paid by unrelated third parties to LICENSEE for the Licensed Products, less taxes, duties, customer returns, credits, sales commissions, reimbursements, transportation and shipping charges. The term "Gross Sales" shall also mean any sublicensing revenue received by LICENSEE from unrelated third parties ("SUBLICENSING REVENUE"). The term "Net Profits" as used herein shall mean the amount of Gross Sales as reduced by the payment of i) all direct manufacturing and processing costs and ii) all general and administrative expenses and disbursements, but excluding executive officer salaries and bonuses. The term "year" as used herein shall mean a period of twelve (12) consecutive months commencing from the execution date hereof and each successive twelve (12) month period thereafter during the term of this Agreement.

3.3 LICENSEE shall pay LICENSOR the royalties specified in Paragraph 3.1 within thirty (30) days after the end of each twelve (12) month period during the term of this Agreement. In the event of termination or expiration of this Agreement, a final payment shall be made by LICENSEE covering the whole or partial calendar year. Each annual payment shall be accompanied by a written statement of the quantity of Licensed Products sold by LICENSEE, the Gross Sales and Net Profits collected by LICENSEE during such calendar year and the amount of royalties payable under this Agreement based thereon.



#### 4. RECORDS AND INSPECTION

4.1 LICENSEE shall maintain or cause to be maintained a true and correct set of records pertaining to the Gross Sales and Net Profits collected by LICENSEE under this Agreement. During the term of this Agreement and for a period of two (2) years thereafter, LICENSEE agrees to permit an accountant selected and paid by LICENSOR and reasonably acceptable to LICENSEE to have access during ordinary business hours to such records as are maintained by LICENSEE as may be necessary, in the opinion of such accountant, to determine the correctness of any report and/or payment made under this Agreement. LICENSOR's access to such records shall be restricted to only once per twelve (12) month period. In the event that the audit reveals an underpayment of royalty by more than five percent (5%), the cost of the audit shall be paid by LICENSEE. Such accountant shall maintain in confidence, and shall not disclose to LICENSOR, any information concerning LICENSEE or its operations or properties other than information directly relating to the correctness of such reports and payments. In the event of an underpayment, LICENSEE shall also pay 7% simple interest, compounded annually, on the underpaid amount.

#### 5. SUBLICENSEES

5.1 All sublicenses granted by LICENSEE of its rights hereunder shall be subject to the terms of this License Agreement. LICENSEE shall give LICENSOR prompt notification of the identity and address of each sublicensee with whom it concludes a sublicense agreement and shall supply LICENSOR with a copy of each such sublicense agreement.

#### 6. PATENTS AND INFRINGEMENT

6.1 LICENSEE agrees to advance all costs, incident to the United States applications, patents and like protection (the "Patent Rights"), for "Capsbiol-T" including all costs incurred for filing, prosecution, issuance and maintenance fees as well as any costs incurred in filing continuations, continuations-in-part, divisionals or related applications and any re-examination or reissue proceedings. The decision to file, prosecute and maintain the patents shall be in the Parties sole discretion.

6.2 LICENSOR agrees to reasonably cooperate with LICENSEE to whatever extent is reasonably necessary to procure patent protection of any rights, including fully agreeing to execute any and all documents to provide LICENSEE the full benefit of the licenses granted herein. LICENSOR further agrees to disclose to LICENSEE all improvements within the scope of the Subject Technology.

6.3 Each Party shall promptly inform the other of any suspected infringement of any claims in the Patent Rights or misuse, misappropriation, theft or breach of confidence of other proprietary rights in the Subject Technology by a third party, and with respect to such activities as are suspected, LICENSEE shall have the right, but not the obligation, to institute an action for infringement, misuse, misappropriation, theft or breach of confidence of the proprietary rights against such third party. If LICENSEE fails to bring such an action or proceeding within a

period of three (3) months after receiving notice or otherwise having knowledge of such infringement, then LICENSOR shall have the right, but not the obligation, to prosecute at its own expense any such claim. Should either LICENSOR or LICENSEE commence suit under the provisions of this Paragraph 6.3 and thereafter elect to abandon the same, it shall give timely notice to the other Party who may, if it so desires, continue prosecution of such action or proceeding. All recoveries, whether by judgment, award, decree or settlement, from infringement or misuse of Subject Technology, shall be apportioned as follows: the Party bringing the action or proceeding shall first recover an amount equal to three (3) times the cost and expenses incurred by such Party directly related to the prosecution of such action or proceeding and the remainder shall be treated as Gross Sales.

6.4 Neither LICENSOR nor LICENSEE shall settle any action covered under Paragraph 6.3 without first obtaining the consent of the other Party, which consent shall not be unreasonably withheld.

## **7. TERM AND TERMINATION**

7.1 Unless earlier terminated as hereinafter provided, this Agreement shall extend perpetually.

7.2 In the event of default or failure by LICENSEE to perform any of the material terms, covenants or provisions of this Agreement, LICENSEE shall have thirty (30) days after the giving of written notice of such default by LICENSOR to correct such default.

7.3 At the date of any termination of this Agreement, LICENSEE shall immediately cease using any of the Subject Technology and return all copies of the same to LICENSOR; provided, however, that LICENSEE may dispose of any Licensed Products actually in the possession of LICENSEE prior to the Agreement Date of termination, subject to LICENSEE'S paying to LICENSOR running royalties in accordance with Paragraph 3 with respect thereto and otherwise complying with the terms of this Agreement.

7.4 No termination of this Agreement shall constitute a termination or a waiver of any rights of either Party against the other Party accruing at or prior to the time of such termination. The obligations of Sections 4, 11 and 12 shall survive termination of this Agreement.

## **8. ASSIGNABILITY**

8.1 This Agreement shall be binding upon and shall inure to the benefit of LICENSOR and its assigns and successors in interest, and shall be binding upon and shall inure to the benefit of LICENSEE and its assigns and successors in interest.

## **9. GOVERNING LAW**

9.1 Any lawsuit pertaining to any matter arising under or growing out of this Agreement shall be instituted in the City of Chicago, County of Cook, State of Illinois. The

formation, interpretation and performance of this Agreement shall be governed by the laws of the State of Illinois, excluding its conflict of laws rules. In any action to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees and court costs.

## 10. ADDRESSES

10.1 Any payment, notice or other communication pursuant to this Agreement shall be sufficiently made or given on the date of mailing if sent to such Party by first class mail, postage prepaid, addressed to it at its address below or as it shall designate by written notice given to the other Party:

LICENSEE:  
Scientific Motive Systems, Inc.  
5364 Tottenham Circle  
Terre Haute, Indiana 47803

LICENSOR:  
Portola Sciences, Inc  
40 Cievos Road  
Portola, California 94028

## 11. CONFIDENTIALITY

11.1 LICENSOR and LICENSEE agree to maintain the Subject Technology in confidence, and to use the same only in accordance with this Agreement. LICENSEE's obligation of confidentiality shall not apply to information which LICENSEE can demonstrate: (i) was at the time of disclosure in the public domain; (ii) has come into the public domain after disclosure through no fault of LICENSEE; (iii) was known to LICENSEE prior to disclosure thereof by LICENSOR; (iv) was lawfully disclosed to LICENSEE by a third party which was not under an obligation of confidence to LICENSOR with respect thereto; (v) which LICENSEE can reasonably demonstrate was independently developed by LICENSEE without use of the Subject Technology; or (vi) which LICENSEE shall be compelled to disclose by law or legal process. The foregoing obligations of confidentiality shall survive termination of this Agreement.

## 12. WARRANTIES AND INDEMNIFICATION

12.1 Neither party makes any representations, extends any warranties, or assumes any responsibilities whatever with respect to use, sale or other disposition of the other party or its vendees or transferees of the Licensed Products.

12.2 LICENSOR represents and warrants that LICENSOR has full right, power and authority to enter into the Agreement and grant all of the right, title and interest in the intellectual property herein granted.

### 13. GENERAL PROVISIONS

13.1 This Agreement sets forth the entire agreement between the parties, and supersedes all other oral or written provisions. This Agreement may be modified only in writing signed by both parties.

13.2 Any waiver by either party of rights arising under this Agreement by reason of a breach by the other party or otherwise, or of any condition of this Agreement shall not stop the waiving party from exercising and enforcing any such right or condition at a subsequent time.

13.3 If any provision of this Agreement is adjudged to be invalid, void, or unenforceable, such provision shall be deleted herefrom and shall not affect the validity of this Agreement and the enforceability of any other provision herein.

13.4 This Agreement shall not be construed to create a partnership, joint venture, employer-employee relationship, or principal-agent relationship between the parties hereto.

13.5 If SMS is ever sold, excluding initial public offerings, Portola will receive 15% of the net proceeds from the sale

#### LICENSEE:

Scientific Motive Systems, Inc.

By 

John W. Van Etten III

State: IN.

County: VIGO

Subscribed and sworn to  
before me this 20TH

day of MARCH, 192000



Notary Public

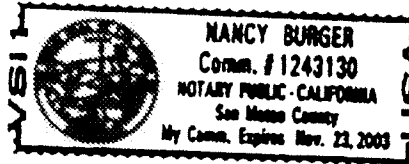
LICENSOR:

Portola Sciences, Inc.

By: *Donald A. Lee*  
Donald A. Lee

By: \_\_\_\_\_  
Amanda Lee

State: California  
County: San Mateo  
Subscribed and sworn to  
before me this 20



day of March 19 2000  
Nancy Burger Donald Lee only  
Notary Public

By: *Dr. D. James Morris*  
Dr. D. James Morris

By: *Dr. Dorothy M. Morris*  
Dr. Dorothy M. Morris

State: Indiana  
County: Tippecanoe  
Subscribed and sworn to  
before me this 22  
day of March 19 2000  
Sandra L. Brown  
Notary Public

SANDRA L. BROWN  
NOTARY PUBLIC, STATE OF INDIANA  
WHITE COUNTY  
COMMISSION NO. 412391  
EXPIRES: AUG. 26, 2001

## EXHIBIT H

### Exclusive Agreement

This Exclusive Agreement ("Agreement"), to be effective as of the 19 day of March, 2000 (hereinafter called the "Agreement Date"), is by and between Scientific Motive Systems, Inc. ("SMS"), an Indiana corporation and Dr. D. James Morre of West Lafayette, IN, Dr. Guy Auderset of Geneva, Switzerland and Mr. Georges Manoukian of Geneva, Switzerland ("The Inventors")

### 1. DEFINITIONS AS USED HEREIN

1.1 The term "Subject Technology" shall mean all technology, know-how, methods, improvements thereto, documents, materials, tests and confidential information to the invention of Capsibiol-T, a neutraceutical composition for the prevention and treatment of cancer, by the "Inventors".

1.2 The term "Gross Sales" shall mean the gross amount of money paid by unrelated third parties to "SMS" for the Capsibiol-T product, less taxes, duties, customer returns, credits, sales commissions, reimbursements, transportation and shipping charges. The term "Gross Sales" shall also mean any sublicensing revenue received by "SMS" from unrelated third parties ("SUBLICENSING REVENUE").

1.3 The term "Net Profit" as used herein shall mean the amount of "Gross Sales" as reduced by the payment of i) all direct manufacturing and processing costs and ii) all general and administrative expenses and disbursements, but excluding executive officer salaries and bonus.

1.4 The term "Year" as used herein shall mean a period of twelve (12) consecutive months commencing from the execution date hereof and each successive twelve (12) month period thereafter during the term of this agreement.

### 2. PAYMENTS

2.1 SMS will make payments to the "Inventors", individually, only after production has commenced using the following schedule:

- a. Every year the greater amount of 0.4% of "Gross Sales" or 2% of "Net Profit", whichever is greater.
- b. All payments will be in United States dollars.

### 3. TERM

3.1 Unless earlier terminated by mutual agreement of all parties subject to this agreement, this "Agreement" shall extend perpetually to the "Inventors" and thier heirs.

#### 4. ADDRESS

4.1 Any payment, notice or other communication pursuant to this "Agreement" shall be sufficiently made or given on the date of mailing if sent to such Party by first class mail, postage prepaid, addressed to it at its address below:

Scientific Motive Systems, Inc.  
5364 Tottenham Circle  
Terre Haute, IN 47803

Dr. D. James Morre  
1112 Cherry Lane  
West Lafayette, IN 47906

Dr. Guy Auderset  
59, Chemin des Me'sanges  
CH 1225 Chene-Bourg  
Geneva, Switzerland

Mr. Georges Manoukian  
Rue de la Scie 4  
CH 1207  
Geneva, Switzerland

#### 5. GENERAL PROVISIONS

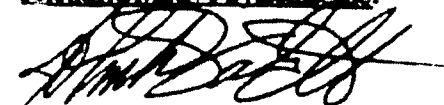
5.1 This "Agreement" sets forth the entire agreement between the parties, and supersedes all other oral and written provisions. This "Agreement" may be modified only in writing signed by all parties.

5.2 If any provision of this "Agreement" is adjudged to be invalid, void, or unenforceable, such provision shall be deleted herefrom and shall not affect the validity of this "Agreement" and the enforceability of any other provision herein.

5.3 This "Agreement" shall not be construed to create a partnership, joint venture, employer-employee relationship, or principal-agent relationship between the parties hereto.

5.4 During the term of the "Agreement", and for a period of two (2) years thereafter, SMS agrees to permit an accountant selected and paid by the "Inventor(s)" and reasonably acceptable to SMS to have access during ordinary business hours to such records as are maintained by SMS as may be necessary, in the opinion of such accountant, to determine the correctness of any report and/or payment made under the "Agreement".

Scientific Motive Systems, Inc.

  
John W. Van Etten III, President

"Inventor"

  
Dr. D James Morre

"Inventor"

  
Dr. Guy Auderset

Witness

  
Margaret A. Beall

"Inventor"

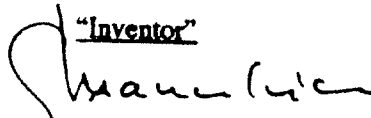
  
Georges Manoukian



EXHIBIT I

S.M.S. Royalty Payments

DATE	CHECK #	TO	AMOUNT
11/13/01	133	Guy Auderset	\$ 20.68
11/13/01	134	Portola	\$ 107.85
11/13/01	135	(Menukian/Mesrobian)	\$ 20.69
1/23/03	320	Portola	\$ 895.97
1/23/03	321	(Menukian/Mesrobian)	\$ 33.73
1/23/03	323	Guy Auderset	\$ 33.73
1/9/04	361	(Menukian/Mesrobian)	\$ 49.78
1/9/04	362	Guy Auderset	\$ 49.78
1/20/05	162	Guy Auderset	\$ 89.81
1/20/05	163	(Menukian/Mesrobian)	\$89.81

*Jim - If you must have  
the cancelled checks  
I can probably find  
them. -  
JL*

EXHIBIT J
-----------

**TRADEMARK ASSIGNMENT**

WHEREAS, PORTOLA SCIENCES, INC., a California corporation, having a principal place of business at 40 Ciervos Road, Portola Valley, CA 94028, has adopted and is the owner of the following trademarks for which applications in the United States Patent and Trademark Office are pending:

TRADEMARK	APPLICATION NO.	FILING DATE
CAPSIBIOL-T	78/164,838	September 17, 2002
CAPSIBIOL	78/328,802	November 17, 2003

WHEREAS, Portola Sciences, Inc. is discontinuing its operations and wishes to transfer all its rights in, to and pertaining to the above trademarks and trademark applications, including marketing rights therein;

WHEREAS, MOR-NUTECH, INC., an Indiana corporation, having a principal place of business at 1112 Cherry Lane, West Lafayette, IN 47906, is desirous of acquiring said trademarks and the applications therefor, as well as marketing rights therein; and

WHEREAS, MOR-NUTECH, INC. is assuming the business of Portola Sciences, Inc. that pertains to the above trademarks;

NOW THEREFORE, in consideration of the sum of \$1.00 and other good and valuable consideration, the receipt of which is hereby acknowledged, PORTOLA SCIENCES CORPORATION hereby assigns to MOR-NUTECH, INC., all right, title and interest in the United States and other countries where such rights may exist, together with the goodwill of the business symbolized by said trademarks and applications to register said trademarks, as well as marketing rights associated with said trademarks.

The United States Commissioner of Patents and Trademarks is requested to issue the Certificates of Registration to the Assignee, MOR-NUTECH, INC.

ASSIGNOR  
PORTOLA SCIENCES, INC.

ASSIGNEE  
MOR-NUTECH, INC.

Donald A. Lee, President

D. James Morré, President

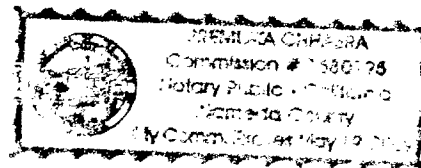
Date: \_\_\_\_\_

Date: 6/7/06

STATE OF CALIFORNIA )  
                                  ) ss  
COUNTY OF San Diego )

On this 7th day of June, 2006, personally appeared Donald A. Lee, President of Portola Sciences, Inc., and acknowledged that he executed the foregoing Assignment on behalf of Portola Sciences, Inc. and pursuant to authority granted to him by that corporation.

Paul A. Chhabra  
Notary Public





USPTO Assignments on the Web

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## Trademark Assignment Abstract of Title

**Total Assignments: 1****Serial #:** 78164838**Filing Dt:** 09/17/2002**Reg #:** NONE**Reg. Dt:****Applicant:** Portola Sciences, Inc.**Mark:** CAPSIBIOL-T**Assignment: 1****Reel/Frame:** 3349/0096**Received:** 07/17/2006**Recorded:** 07/17/2006**Pages:** 4**Conveyance:** ASSIGNS THE ENTIRE INTEREST**Assignor:** PORTOLA SCIENCES, INC.**Exec Dt:** 07/03/2006**Entity Type:** CORPORATION**Citizenship:** CALIFORNIA**Entity Type:** CORPORATION**Citizenship:** INDIANA**Assignee:** MOR-NUTECH, INC.

1112 CHERRY LANE

WEST LAFAYETTE, INDIANA 47906

**Correspondent:** RONALD FRIEDLAND

4875 PEARL EAST CIRCLE, SUITE 200

BOULDER, CO 80301

If you have any comments or questions concerning the data displayed, contact PRD / Assignments at 571-272-3350. v.2.0.1  
Web interface last modified: April 20, 2007 v.2.0.1

Search Results as of: 01/19/2008 05:52 PM

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EXHIBIT K

Georges Manoukian  
c/o Actibici SA  
4, rue de la Soie  
1207 Genève

**ACKNOWLEDGE RECEIPT**

Mr Donald LEE  
PORTOLA SCIENCES  
40 Ciervos  
Portola Valley, CA 94028  
U S A

Geneva, September 6, 2002

Re : "CAPSIBIOL - T"

Dear Sir,

As co-owner of the "CAPSIBIOL-T" trademark, as inventor, unique holder and creator of the secret formula made from the extract of "bird chilli pepper", that led to the development of the complex for which you've registered the "CAPSIBIOL - T" trademark. I have learned that you have requested in writing, on January 22, 2001, to the proper authorities the abandonment of the trademark.

As a result, I have the following questions :

1. Why didn't you inform me previously of your intention ?
2. What are the reasons that motivated such a decision ?
3. Have you informed all interested parties in the United States ?

Needless to say that the authorization that I had granted you to negotiate a license of exploitation of "CAPSIBIOL - T" in the United States is now null and void. Hence, this now liberates me from all engagements you may have undertaken in my name and I will add that some have been taken without consulting me for advice.

I await your response within the next fifteen days upon receipt of this letter.

Sincerely yours,

Georges Manoukian

P.S. Copy for information to Guy Auderset.